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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO.

VELMA DODD,

Administratrix of the Estate of Dwayne Dodd

Petitioner

- vs -

CITY OF NORWICH and ERIC LARSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. In a Monell action brought by the estate of a child killed by a police patrolman, does City of Los Angeles v. Heller totally insulate the municipality from liability merely because the patrolman was not liable, when the patrolman's action had been ordered by a supervisor carrying out official municipal policy?

2. Do Daniels v. Williams and Davidson v. Cannon, holding that a deprivation of due process cannot result solely from negligence, extend to deprivations of the Fourth Amendment right to be free from unreasonable seizures?

3. Under Tennessee v. Garner, is a "seizure" complete for Fourth Amendment purposes as soon as the first handcuff is applied in the field?

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The Petitioner, VELMA DODD, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 31, 1987.

OPINION BELOW

The final opinion of the United States Court of Appeals for the Second Circuit, after reargument, is reported at 827 F.2d 1 (2d Cir. 1987), and appears in the Appendix hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on August 31, 1987. This petition for certiorari has been filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. In a Monell action brought by the estate of a child killed by a police patrolman, does City of Los Angeles v. Heller totally insulate the municipality from liability merely because the patrolman was not liable, when the patrolman's action had been ordered by a supervisor carrying out official municipal policy?

2. Do Daniels v. Williams and Davidson v. Cannon, holding that a deprivation of due process cannot result solely from negligence, extend to deprivations of the Fourth Amendment right to be free from unreasonable seizures?

3. Under Tennessee v. Garner, is a "seizure" complete for Fourth Amendment purposes as soon as the first handcuff is applied in the field?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."

U.S. Constitution, Amendment XIV:

...No State...shall...deprive any person of life, liberty or property, without due process of law....

42 U.S.C. §1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdic-

tion thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

STATEMENT OF THE CASE

Dwayne Dodd, a sixteen year old boy and the son of the plaintiff, was killed by the defendant Eric Larson, a Norwich, Connecticut police officer. The district court, which tried this case without a jury, made the following relevant findings of fact: "Dwayne Dodd and Jervis Bell were robbing a house in the City of Norwich, which, unbeknownst to them, was equipped with a silent burglar alarm. Two police officers were dispatched to the house: Eric Larson and Larry Rice. Larson took a position at the rear of the house and Rice at the front of the house. Rice observed, through the front door, two persons inside the house and informed Larson that there were two or more burglars. Shortly thereafter, Dodd stuck his head out an open window in the

rear of the house. Larson, with his gun drawn, ordered Dodd to come out of the house. Dodd complied and fell through the window to the ground below among some shrubs.

While Dodd was lying on the ground, Rice returned to the rear of the house and saw Dodd. Then Rice went again to the front of the house and apprehended Bell who ran out the front door. While Rice was in the front, Larson decided to handcuff Dodd. To accomplish this task, Larson ordered Dodd to place both hands in front of his head and lie with his face on the ground. (Dodd had fallen with his left hand in front of his head and his right arm bent with his hand partly under his chest.) Dodd did not comply and remained in the position in which he had fallen.

Larson then approached the defendant and knelt in front of Dodd's head within one foot of him. With the gun held in his right hand, Larson placed a cuff on Dodd's left wrist. Larson then pulled the left wrist to the small of Dodd's back. Larson released the left hand and the handcuffs and reached for Dodd's right hand. Dodd then jerked forward and reached, with his right hand, for Larson's gun. Larson instinctively reacted by pulling his hand (and the gun) away from Dodd. During this scuffle, the gun discharged and Dodd died within a few minutes."

The Norwich police chief testified that it was official municipal policy in Norwich that police officers hold their service revolvers in one hand while attempting to handcuff prisoners with the other hand,

without waiting for police backup, and that during this process the officer's finger be kept on the trigger of the revolver. The training officer of the Norwich Police Department testified that he had instructed Officer Larson and all other officers to make arrests in this manner. It was undisputed that Officer Larson was carrying out this order, in pursuit of this municipal policy, at the time of the killing in this case.

The plaintiff's expert witness, the former deputy chief of the Los Angeles, California, Police Department, was described by the district court as having "impeccable credentials...." He testified that the municipal policy described above was grossly negligent, constituted deliberate indifference to the safety of persons

arrested, and made it inevitable that some arrestee would die as a result.

The district court entered judgment in favor of the individual police officer defendant. It did so by holding that (1) even gross negligence does not constitute a substantive due process violation actionable under 42 U.S.C. §1983, (2) if the police officer was negligent, he was not negligent with respect to the deceased because the standard of care violated existed only to protect the safety of the officer, (3) the municipality could not be held liable unless the officer were liable and, accordingly, judgment also entered in favor of the municipality. The Court did not consider the Fourth Amendment issue.

On appeal, the Second Circuit initially accepted the trial court's holding respect-

ing the simple negligence claim against the individual police officer, but reversed the holding that the municipality could not be held liable for a Fourth Amendment violation or a substantive due process violation in the absence of individual officer liability, and remanded as to the individual officer for a finding as to the reasonableness of the officer's use of this particular type of deadly force in seizing the person of the deceased. After reargument, however, one judge changed his vote and the Court of Appeals affirmed the judgment of the district court. In his dissenting opinion, Judge Pratt correctly summarized the majority holding as follows:

"(1) Once a police officer applies a single handcuff to an arrestee, the 'seizure' is complete for fourth amendment

purposes...and there is no duty of reasonableness under Tennessee v. Garner, 471 U.S. 1 (1985), for anything that follows.

"(2) Any municipal arrest policy, so long as it does not authorize the intentional use of unreasonable force, is immune from fourth amendment scrutiny, no matter how likely it might be to cause 'inadvertent' injuries or deaths.

"(3) The Supreme Court's holdings in Daniels v. Williams, 474 U.S. 327 (1986), and Davidson v. Cannon, 474 U.S. 344 (1986), that a deprivation of due process cannot result solely from negligence, extend to deprivations of the fourth amendment right to be free of unreasonable seizures...."

Based upon that analysis, the ruling of the district court, holding against the

plaintiff in all respects, was affirmed.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS IS AT ODDS WITH THE HOLDING OF THIS COURT IN CITY OF LOS ANGELES V. HELLER.

In a Monell action brought by the estate of a child killed by a police patrolman, City of Los Angeles v. Heller does not insulate the municipality from liability merely because the patrolman was not liable, when the patrolman's action had been ordered by a supervisor carrying out official municipal policy.

Contrary to the holding of the Court of Appeals in this case, City of Los Angeles v. Heller, 475 U.S. 796, 106 S.Ct. 1571 (1986), does not hold, nor has this court

ever held, that individual police officer liability is an essential prerequisite to municipal liability under Monell v. Department of Social Services, 436 U.S. 658 (1978). Heller, on the contrary, stands for the limited proposition that a municipality cannot be liable for constitutional violations under Monell unless the act of the municipality has proximately caused the plaintiff's constitutional loss.

In this case, neither the district court nor the Court of Appeals has held that the plaintiff suffered no constitutional injury. Rather, the district court held only that the individual patrolman whose gun discharged "did not violate Dodd's constitutional rights." 603 F.Supp. at 517. No court has yet determined whether in fact the plaintiff suffered a

constitutional deprivation. Indeed, one of the points advanced by the dissenting opinion in the Court of Appeals is that the case should be remanded to the district court for further findings on this precise issue.

Neither Monell nor any other case requires a finding of liability by an individual police officer before a municipality can be held liable for actions which cause a constitutional deprivation. Thus, the plaintiff might well elect not to sue the officer or officers who inflicted a particular injury, choosing instead to sue only the municipality. The decision of the Court of Appeals in this case would preclude such a tactical choice and require the plaintiff in every instance to sue both the municipality and all participating

individual officers. Such a requirement makes no sense.

In this case, the patrolman whose gun fired the fatal bullet was only the last link in a chain of events which caused the plaintiff's injury. That officer, it was clear, was only following the orders of his superiors. It is entirely consistent with a finding that he was not liable to say that the municipality which created the policy was liable and, indeed, that the training supervisor who designed the policy also would have been liable had he been sued.

Thus, the Court of Appeals violated the prior holdings of this Court and established a dangerous and irrational precedent in holding that municipal liability must as a matter of law be conditioned upon the

liability of one individual officer who clearly did nothing but follow his orders.

II

THE HOLDING IN DANIELS V. WILLIAMS AND DAVIDSON V. CANNON, THAT A DEPRIVATION OF DUE PROCESS CANNOT RESULT SOLELY FROM NEGLIGENCE DOES NOT EXTEND TO DEPRIVATIONS OF THE FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEIZURES.

In Daniels v. Williams, 474 U.S. 327 (1986), and Davidson v. Cannon, 474 U.S. 344 (1986), this Court overruled Parratt v. Taylor, 451 U.S. 527 (1981), "to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty or property under the Fourteenth Amendment." This Court held that unintentional injuries do not violate the due process clause.

This case presents a claim of unreasonable seizure in violation of the Fourth

Amendment, under Tennessee v. Garner, 471 U.S. 1 (1985). This Court has never held that negligent or unintentional actions cannot as a matter of law violate the Fourth Amendment. Indeed, such a proposition would make no sense. Unintentional violations of the Fourth Amendment frequently occur and as frequently have been the subject of suppression orders at the trial level in criminal cases. Under such circumstances, the individual officer might well have a qualified immunity defense, but no such defense would be available to the municipality. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

In holding that, as a matter of law, the Fourth Amendment violations must be intentional in order to be actionable, the Court of Appeals went far beyond any prior

holding of this or any other Appellate Court and produced a result which is entirely contrary to the history of Fourth Amendment law and to good sense.

III

UNDER TENNESSEE V. GARNER, A "SEIZURE" IS NOT COMPLETE FOR FOURTH AMENDMENT PURPOSES AS SOON AS THE FIRST HAND-CUFF IS APPLIED IN THE FIELD.

The majority of the Court of Appeals held here that for purposes of Tennessee v. Garner, 471 U.S. 1 (1985), the seizure of the victim was complete the moment the first handcuff was affixed to the his left wrist. Obviously, on the facts of this case, that holding is utterly illogical because the death admittedly was caused while the patrolman was attempting to complete the process of handcuffing the victim in preparation for transporting him

to police headquarters for booking. Thus, to hold as the Court of Appeals did here, that the arrest had been completed prior to the victim's death is not only contrary to law but also contrary to reason. It makes no more sense to so hold than it would to hold that the Fourth Amendment seizure in Tennessee v. Garner was completed upon ordering the victim to halt so that the subsequent shooting would not have been affected by Fourth Amendment considerations.

The only reasonable rule consistent with the policy of Tennessee v. Garner would be that articulated by the Ninth Circuit in Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985): "Seizure continues throughout the time the arrestee is in the

custody of the arresting officers....Therefore, excessive use of force by a law enforcement officer in the course of transporting an arrestee gives rise to a Section 1983 claim based upon a violation of the Fourth Amendment." See also, Gilmere v. City of Atlanta, 774 F.2d 1195, 1202 (11th Cir. 1985) (en banc), cert. denied 106 S.Ct. 1970 (1986).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted:

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